standard rent with reference to the market value of the premises. Unless there is evidence we cannot say.

For the reasons given we allow the appeal with costs and dismiss the cross-appeal also with costs, and the deposit should be refunded to the appellants.

Since the standard rent is a continuing process, the respondents are not in any way prejudiced by this judgment, if they so wish, to start fresh proceedings before the LTT.

Appeal allowed;
Cross-appeal dismissed.

Solicitors: *Rayner & Co.; Shelley Yap Leong Tseu Chong Chia & Co.*

TAN CHONG & SONS MOTOR COMPANY (SDN.) BERHAD. v. ALAN McKNIGHT

[F.C. (Wan Suleiman, Salleh Abas and Abdul Hamid F.JJ.) August 17; December 4, 1982]

[Ipoh – Federal Court Civil Appeal No. 15 of 1982]

Contract – Sale of goods – Collateral warranty – Purchase of motor car – Buyer's order containing condition that no guarantee or warranty given by the seller – Oral representation that motor car would conform to Australian Design Regulations – Motor Car supplied not complying with Regulations – Claim for damages for breach of warranty – General and special damages – Special damages not pleaded – Application to amend pleading – Costs.

Evidence – Written contract for purchase of car – Oral representations – Whether admissible – Evidence Act (Revised 1971), s. 92.

Practice & Procedure – Special damages not pleaded – Application to amend pleading – Amendment allowed – Costs – Interest.

English Law – Whether English Sale of Goods Act, 1979, applies in Penang.

In this case the respondent was a squadron leader in the Royal Australian Air Force. He wanted to buy a car and get the benefit of exemption from duty in Malaysia and Australia. He would have obtained the exemption if the motor car was taken out of Malaysia and if it complied with the Australian Design Regulations. He agreed to buy a car from the appellants and signed a Buyer's Order which contained a condition that no guarantee or warranty of any kind whatsoever was given by the company. However the respondent only bought the car on the representations of the appellant's salesman that the car conformed to the Australian Design Regulations. The car supplied did not comply with the Regulations and the respondent had to sell the car for $6,500.00 thereby incurring a loss of $11,219.54 ($17,719.54-$6,500.00). The respondent also lost the fiscal advantage of importing the car to Australia duty free. The respondent claimed damages for breach of warranty. The learned trial judge found that there had been a warranty and this was breached by the appellants. He awarded general damages of $10,500.00 with interest at 8% from the date of the writ to the date of payment and costs of the suit at the Subordinate Court's scale. No special damages were awarded as these were not pleaded and an application for amendment of the pleadings was refused. The appellants appealed to the Federal Court contending that they were not liable or that the damages were too high while the respondents cross-appealed on the ground that the damages were too low and that he was entitled to interest from the date of accrual of the cost of action and to costs of the suit at the High Court scale and to special damages. At the hearing of the appeal, counsel for the appellants accepted the findings of facts by the learned trial judge. The appeal was therefore confined to legal issues on liability and quantum only.

Held: (1) there can be no doubt that it was the representations by the salesman expressed by words and conduct that led to the respondent to enter into the agreement to purchase the car. There was abundance of evidence showing that the representations were not innocent and on the contrary could even be considered to be deceitful or plain lies;

(2) there was clear evidence that had it not been for the promise of the salesman to deliver him a car complying with the Australian Design Regulations, the respondent would not have signed the Buyer's Order;

(3) the representations made by the salesman was binding on the appellants. It would lead to great mischief in the law and certainly would not be in the interest of business efficacy if representations made by a salesman in the course of his employment could not be relied upon by an intending purchaser whom he was dealing with;

(4) the prohibition against admissibility of evidence under section 92 only applies where all – as opposed to some only – of the terms of the contract are written into the agreement. Thus where some terms are given orally and some in writing oral evidence can be given to prove the terms agreed to orally;

(5) where the oral representations as in this case are in conflict with the printed condition in the written contract, the representations must be given an overriding effect and the printed condition must therefore be rejected;

(6) it made no difference in this case whether the English Sale of Goods Act 1893 or the English Sale of Goods Act, 1979, applies in Penang. It was not necessary or relevant to decide the question as to which of the two English Sale of Goods Act is applicable;

(7) the amount of damages which should be awarded in this case should be the financial loss directly suffered by the respondent as a result of the dealing with the appellants i.e. $11,219.54;

(8) it was just and proper in this case that the learned trial judge should allow the amendment of the pleading to enable special damages to be awarded. On the basis of the evidence, special damages of $2,341.35 should be awarded;

(9) the costs in this case should be fixed at High Court scales as the case involved difficult questions of law, especially on the question of warranty and measure of damages;

(10) interest is a matter of discretion and on the facts of the case the learned trial judge was not in error to order interest to run from the date of the writ.

Cases referred to:

(1) *Wong Wai Cheng* v. *Attorney-General of Singapore* [1979] 1 M.L.J. 59, 62.
(2) *Tindok Besar Estate Sendirian Berhad* v. *Tinjar Co.* [1979] 2 M.L.J. 229, 233.
(3) *Baker* v. *Asia Motor Company Limited* [1962] M.L.J. 425.
(4) *J. Evans & Son (Portsmouth) Limited* v. *Andrea Merzario Ltd.* [1976] 2 All E.R. 930, 934.
(5) *Damu Jadhao* v. *Paras Nath Singh* [1965] 2 M.L.J. 38, 39.
(6) *Heilbut Symons & Co.* v. *Buckleton* [1913] A.C. 30, 47.
(7) *Erskine* v. *Adeane* (1873) 8 Ch. App. 756.
(8) *De Lassalle* v. *Guildford* [1901] 2 K.B. 215.
(9) *Dick Bentley Productions Ltd. & Anor.* v. *Harold Smith (Motors) Ltd.* [1965] 2 All E.R. 65, 67.
(10) *Chess (Oscar) Ltd.* v. *Williams* [1957] 1 All E.R. 325.
(11) *Mendelssohn* v. *Normand Ltd.* [1969] 2 All E.R. 1215, 1218.
(12) *Firestone Tyre; and Rubber Co. Ltd.* v. *Vokins Ltd.* [1951] 1 Lloyd's Rep. 32, 39.
(13) *Hadley* v. *Baxendale* (1854) 9 Exch. 341, 354; 156 E.R. 145.

HIGH COURT.

N.T. Vello for the plaintiff.
Louis Edward Van Buerle for the defendant.

Cur. Adv. Vult.

Gunn Chit Tuan J.: Alan McKnight (the plaintiff) sued Tan Chong & Sons Motor Company (Sendirian) Berhad (the defendant) for damages for breach of an agreement under which the defendant sold him a Datsun 260C automatic station wagon (the car). The plaintiff's claim was that the defendant had expressly warranted by his representative that the car would comply with and meet all requirements of the Australian Design Rules (ADR) or at least that the representations did amount to an implied warranty that the car complied with the ADR.

The plaintiff told the court that as an Australian serviceman in this country he was entitled to purchase a car duty free in Malaysia and to take it back to Australia when his tour of duty ended. He was also entitled to take the car back without paying any duty in Australia. The plaintiff, whom the court believed and whose evidence was to a large extent supported by his witness, another Australian serviceman called Lieut. Francis Drake (P.W.2), said that he spoke to one Mr. Sze (D.W.1) in his house at the Royal Australian Air Force base at Butterworth some time during the first week of 1978. He told Mr. Sze that he wanted a car which must conform with the ADR because he intended to take it back to Australia. D.W.1 claimed that he could sell him such a car which he would have to import from Japan. At the second meeting in his house on January 6, 1978, D.W.1 told him in the presence of P.W.2 and his wife that he had cabled Japan for delivery at Singapore a white Datsun 260C which complied with the ADR. D.W.1 also told him that he was waiting for a reply from Japan and there was then a discussion during that meeting about the futility of bringing back a car to Australia from Malaysia which did not conform with the ADR. About three days later, D.W.1 came to his house and again in the presence of P.W.2 and his wife produced a document from his brief case and read it to him that Nissan Motors Ltd. of Japan was taking a car from their Australian assembly line and shipping it out to Singapore. D.W.1 also apologised for not being able to show him a model of the car as they only imported them on special order but he then went to the house of one of his neighbours, a Mr. Christie, and brought his car, which was similar to the one he wanted to buy, to show him. That Mr. Christie, another Australian serviceman, was also not able to take his car back to Australia. When they met again two nights later, the plaintiff signed some customs exemption forms (pages 13 & 14 of agreed bundle "B"). D.W.1 then told him that the car he was buying would not have a compliance plate to show that the vehicle complied with certain ADR. Before a car could be registered in Australia, it must have either a compliance plate or a letter of guarantee and D.W.1 showed him such a letter (page 1 of agreed bundle "B") which was given by the defendant to another Australian serviceman called Iddon and promised that he would give him such a letter when he took delivery of the car. He was given a letter (page 4 of agreed bundle "B") some time in May 1978 after delivery of the car in which the words used did not amount to a guarantee that the car conformed with the ADR. He complained to and argued with Mr. Sze who then promised that he would get him a letter of guarantee and also modify the car free of charge. He never got that letter of guarantee although he made several trips to Tan Chong & Sons. Eventually he had to place this matter in the hands of the Legal officer of the R.A.A.F. base.

The defendant's principal witness was Mr. Bobby Sze (D.W.1). He told the court that he

went to the plaintiff's house on January 5, 1978 after receiving a telephone call from him. He told the plaintiff that he could not sell him a 260 saloon but could only sell him a 260C station wagon. He also asked him whether he wanted a duty-free car because he knew from experience that most Australians bought their cars duty-free. He explained to him the procedure to apply for exemption and made an appointment for him to test drive a car the next day. He went to the plaintiff's house on January 6, 1978 in their 260C station wagon demonstration model. The plaintiff asked various questions about the car but did not mention about the ADR. On the evening of January 7, 1978 he made an appointment with one Mr. Christie, who happened to own one of the station wagons, to go with him to plaintiff's house to assist him to close the sale. The plaintiff decided to buy a white car on the evening of January 7, 1978 and he went to see him again on January 9, 1978 for him to sign the buyer's order – exhibit D1. He also gave the plaintiff all the customs papers for signature and submission to his Head-quarters. After January 9, 1978 he only met the plaintiff again in April and on that occasion when he introduced a fellow officer called Drake (P.W.2) the plaintiff also did not mention about the ADR. He personally delivered the car to the plaintiff some time in May 1978. The plaintiff had a few complaints about the tail-light, glass, etc. but there was no complaint that the car did not comply with the ADR. He did not at any time promise the plaintiff that he would get a letter from Nissan, Japan, to say that the car complied with the ADR.

After observing D.W.1 and having heard his evidence, I did not find him to be a witness of truth. Under cross-examination he first said that he did not tell the plaintiff about the ADR because after Iddon's case he was told not to promise any letter of guarantee. But when he was shown paragraph 6 of the defendant's amended statement of defence in which it was averred that "the plaintiff was informed by the defendants that they are not familiar with the Australian Design Rules (ADR)", D.W.1 added that he only told the plaintiff that others had not encountered any problems in importing cars back to Australia. Again D.W.1 said under cross-examination that the plaintiff did not discuss any problems of registration with him. But when he was shown and referred to paragraph 3 of the letter (page 4 of agreed bundle "B") which the defendant gave to the plaintiff and in which it was stated that "there have been quite a number of our vehicles exported by *bona fide* purchasers into Australia without encountering any problems of registration", D.W.1 then admitted that the plaintiff was scared that he could not register the car in Australia. D.W.1 denied under further cross-examination that a Datsun letter of guarantee (page 1 of agreed bundle "B") was shown to the plaintiff. I did not believe that answer nor did I think it probable that the said letter was not shown to the plaintiff who would otherwise not have been aware of the existence of that letter. When that letter was shown and referred to D.W.1 he had the cheek to tell the court that he would not know if that was a letter of compliance and denied that he had ever seen that letter before, although he admitted that he was the person who dealt with the purchase of a car by another Australian serviceman called Iddon and had told the court earlier on that after Iddon's case he was instructed not to promise customers such a letter. D.W.1 admitted however that the plaintiff did tell him that he wanted to export the car back to Australia but still claimed that he did not know that the car had to comply with certain Australian regulations.

The defendant's Branch Manager at Butterworth (D.W.3) told the court that he first saw the plaintiff and his friend Drake (P.W.2) some time in June 1978 when they came and showed him a letter from Nissan Motor Limited (page 7 of agreed bundle "B") stating that thay had asked "Tan Chong Motor Company to contact ... and settle this matter without inconveniencing ... much and report ... the real cause of this insufficient arrangements". He also referred to the letter (page 4 of agreed bundle "B") which was given to the plaintiff and said that that was a standard letter to R.A.A.F. people and that D.W.1 had told him that the plaintiff wanted such a letter.

Under cross-examination D.W.3 admitted that the defendant knew that the plaintiff wanted to export the vehicle to Australia. At first he denied that he was ever aware that the plaintiff wanted a car with ADR's specifications but after he was referred to a letter which the plaintiff sent to him during the third week of January 1978 (pages 9 and 10 of agreed bundle "B") he admitted that there was reference in it to the ADR and that he had knowledge that the plaintiff required a car which complied with the ADR. He further said that when he questioned D.W.1 the latter had told him that he never committed himself about the ADR. After seeing D.W.3 and hearing his evidence, I also did not accept him to be a witness of truth.

On the evidence, both oral and documentary, adduced I found that the plaintiff had proved on the balance of probabilities that he did ask for a vehicle which conformed with the ADR when he met D.W.1 in his house on the relevant dates and discussed with him about the purchase of the car. I also found that D.W.1 knew that the plaintiff wanted a car for eventual export to Australia and did expressly represent to him that he could sell him a car which complied with the ADR. Even if D.W.1 did not expressly warrant that the car would comply with and meet all requirements of the ADR, I found that his representations both by words and conduct to the plaintiff did amount to an implied warranty on behalf of the defendant that the car to be supplied to the plaintiff would comply with the ADR. The plaintiff has also proved that the car which was delivered to him by the defendant in May 1978 did not conform to the ADR. The letter from Nissan Motor Company Limited dated October 28, 1971 at page 15 of the agreed bundle "A" shows that in the case of several cars including that of the plaintiff, that is, "all other vehicles in the list (except one Mr. Dobson's and Mr. Deacon's cars) are not to meet ADR" and "it is practically impossible to modify the vehicles of non-ADR specifications to ADR specifications".

One of the main contentions of Mr. Van Buerle, counsel for the defendant, was that a written contract i.e. referring to the buyer's order (exhibit D1), had been made between the plaintiff and the defendant in respect of the purchase of the car. He contended that exhibit D1 sets out fully the terms and conditions in respect of the sale of the car by the defendant to the plaintiff and there was no mention of the ADR in the said exhibit D1. He referred to the cases of *Wong Wai Cheng* v. *Attorney-General of Singapore*[1] and *Tindok Besar Estate Sendirian Berhad* v. *Tinjar Co.*[2] and submitted that as there was a written contract governing the sale and purchase of the car, no parol evidence should be admitted by the court to contradict, vary, add to or subtract from the terms of the written contract. Counsel also referred to the following condition appearing on the back of the buyer's order (exhibit D1):–

"No guarantee or warranty of any kind whatsoever is given by the Company in respect of the vehicle, the subject of the order, unless such guarantee and/or warranty is separately stipulated in writing hereto, but the Buyer/Hirer shall be entitled to the benefit of the Manufacturer's Warranty.",

and contended that any separate oral agreement must not be inconsistent with that condition. It was another contention of counsel for the defendant that if at all the plaintiff had any cause of action it should be based on a contract collateral to the main contract i.e. exhibit D1. He stated that the plaintiff had failed to plead the existence of a collateral contract and was bound by his pleadings, and in the absence of a plea of the existence of a collateral contract, it followed that the plaintiff's action must fail.

Counsel for the defendant also stated that the plaintiff must prove that the car concerned did not comply with the ADR. He referred to a letter and two documents issued by the Main Roads Department (MRD), Queensland, concerning "Prerequisites for registration in Queensland of a right-hand drive vehicle imported for private use" (pages 22-26 of agreed bundle "A" and pages 9 and 10 of agreed bundle "C") and submitted that they showed that the car could have been registered in Queensland. He also referred to a Circular No. 56 issued by the Secretariat Road Safety and Standards Authority of Melbourne, Victoria, concerning "Restrictions on imported vehicles" (pages 27 to 30 of agreed bundle "A") and submitted that the plaintiff's car came within the exceptions referred to in the said Circular prohibiting the import of vehicles to Melbourne. Counsel therefore submitted that the documents referred to in the agreed bundles of documents show that the plaintiff's car could have been registered in at least three Australian States and that the plaintiff did not make any effort to register his car in Australia. Finally counsel referred to section 55 of the Sale of Goods Act, 1893, regarding exclusion of implied terms and conditions and submitted that the conditions appearing on the back of the buyer's order (exhibit D1) would negative any express or implied warranty.

As regards damages, counsel submitted that it was a sale of goods transaction and as such the English Sale of Goods Act, 1893, applied by virtue of section 5 of the Civil Law Act 1956 (Revised – 1972). In particular, he referred to section 53 of that Act concerning remedy for breach of warranty and submitted that as the plaintiff was under a duty to mitigate his damages and since he has failed to make any effort to register his car in Australia, only nominal damages should be awarded to him in any event. He also contended that there was what he called a collateral agreement incorporated in the letter which was given to the plaintiff in May 1978 (page 4 of agreed bundle "B") and argued that the plaintiff had failed to exercise his rights to sell the car back to the

defendant at market value less depreciation. In the alternative he submitted that if at all the damage suffered by the plaintiff amounted to $5,219.56 only which was the purchase price of the car minus the freight charges from Penang to Australia as agreed between the parties at $2,000.00 and the sum of $10,000.00 which was the original offer to him by another Australian serviceman called Phelan who eventually bought it from him for $6,500.00.

In reply Mr. Vello, senior counsel for the plaintiff, contended that exhibit D1 was only a buyer's order or a formal confirmation of purchase. He pointed out that although the said buyer's order was dated January 9, 1978 it was confirmatory that prior to that date there was an oral agreement to purchase the car and exhibit D1 merely confirmed the purchase. He also pointed out that exhibit D1 was not complete and did not contain full details such as the year of model and the date of delivery of the vehicle ordered. He then referred to the cases of *Baker* v. *Asia Motor Company Limited*[3] and *J. Evans & Son Portsmouth Limited* v. *Andrea Merzario Ltd.*[4] and submitted that there was only one agreement for the purchase of the vehicle which was partly oral, partly written and partly by conduct. There was no collateral agreement which the plaintiff relied on and which must be pleaded in the statement of claim, and the court was entitled to look at all the evidence to determine the bargain struck between the parties. Counsel also referred to the case of *Damu Jadhao* v. *Paras Nath Singh*[5] and submitted that section 92 of the Evidence Ordinance only applied when all the terms of a contract have been reduced by consent of the parties to the form of a document and that evidence other than the buyer's order could be given in proof of the terms of the contract in this case.

Counsel also referred to section 14(3) of the English Sale of Goods Act, 1979, concerning implied terms about quality or fitness which reads as follows:

"(3) Where the seller sells goods in the course of business and the buyer, expressly or by implication makes known –

(a) to the seller, or

(b) ...

any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit-broker.",

and submitted that Tan Chong & Sons as sole agents of Datsun cars in Malaysia had knowledge of the plaintiff's requirements. As regards the defendant's allegation that the plaintiff's car could be registered in Australia, counsel stated that only one Australian serviceman's car, namely that of a Mr. Deacon, could be registered. He pointed out that whether the plaintiff's car complied with the ADR could only be shown by the existence of a compliance plate or a letter of compliance and that the letter from Nissan Motor Company Limited (page 15 of agreed bundle "A") which was not challenged by the defendant clearly proved that the plaintiff's car did not comply with the ADR and that the various documents in the agreed bundles of documents show that the plaintiff's car could not be modified as regards the head restraint and exhaust emission control.

As regards damages, Mr. Vello referred to section 53 of the English Sale of Goods Act, 1979, concerning remedy for breach of warranty. That Act came into force on December 6, 1979 and the relevant provisions of the said section are substantially similar to the provisions of the relevant sub-sections of section 53 of the former English Sale of Goods Act, 1893, which were referred to by Mr. Van Buerle, and they read as follows:

"Remedy for breach of warranty

53. (1) ...

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.

According to the calculations of Mr. Vello the retail price of a 260C automatic station wagon was A$9,278.00 in Australia until August, 1978. (See page 15 of agreed bundle "C"). He urged the court to adopt a rate of exchange of one Australian dollar to two dollars and sixty cents Malaysian and estimated that the price of a similar car in Australia in 1978 was M$25,992.69. He submitted that a fair estimate of the loss suffered by the plaintiff was, and he therefore asked for, $10,500.00 as general damages plus costs on High Court higher scale.

It was common ground that the English Sale of Goods Act applied in this case by virtue of section 5 of the Civil Law Act, 1956 (Revised – 1972) because the Sale of Goods (Malay States) Ordinance, 1957, did not apply to a contract of sale of goods in the State of Penang. But I disagreed with Mr. Van Buerle that it was the English Sale of Goods Act, 1893, that applied and considered that as the contract in this case was made after May 18, 1973 and before December 6, 1979 when the English Sale of Goods Act, 1979, came into force, section 14(3) of the said Act as modified by Schedule 1 thereof applied. In this case, the defendant was the seller of Datsun cars in the course of its business and the plaintiff as buyer had expressly or by implication made known to D.W.1, an agent of the defendant, the particular purpose for which the car was being bought, namely, for temporary use in Malaysia and eventual export back to Australia. There was therefore an implied condition that the car supplied under the contract was reasonably fit for that purpose, whether or not such cars are commonly supplied by the defendant for use here and eventual export to Australia. I also found that the circumstances showed that the plaintiff as buyer did rely, and it was not unreasonable for him to rely, on the seller's skill or judgment. With respect I considered that it was misleading and confusing on the part of counsel for the defendant to argue or to treat the warranty in this case as a collateral contract, although it was difficult to avoid thinking of the warranty as collateral. In this case, the warranty was really one of the promises that go to make up the main contract, which I considered, as in the case of *Evans J. & Son (Portsmouth) Limited* v. *Andrea Merzario Ltd.*[4], was partly oral, partly written and partly by conduct. To call the warranty in this case collateral was misleading as it should be distinguished from a genuine collateral contract separate from a main contract of the type referred to by counsel for the plaintiff in the case of *Heilbut, Symons & Co.* v. *Buckleton*[6] which is also an authority that genuine collateral contracts are rare and difficult to prove and are "viewed with suspicion by the law."

As regards counsel for the plaintiff's contention that the conditions on the back of the buyer's order (exhibit D1) had not negatived any express or implied warranty, I considered that section 55 of the Sale of Goods Act, 1893, did not apply and that as this was a contract made after May 18, 1973 and before February 1, 1978, section 55 of the English Sale of Goods Act, 1979, as modified in Schedule 1 therefore applied. Sub-sections (4) and (7) of that modified section 55 read as follows:

> "(4) In the case of a contract of sale of goods, any term of that or any other contract exempting from all or any of the provisions of section 13, 14 or 15 above is void in the case of a consumer sale and is, in any other case, not enforceable to the extent that it would not be fair or reasonable to allow reliance on the term."
>
> "(7) In this section "consumer sale" means a sale of goods (other than a sale by auction or by competitive tender) by a seller in the course of a business where the goods –
>
> (a) are of a type ordinarily bought for private use or consumption; and
>
> (b) are sold to a person who does not buy or hold himself out as buying them in the course of a business."

I considered that this was a "consumer sale" within the meaning assigned to it in the above-mentioned section 55(7) and that in this case of a contract of sale of a car, the term or so-called condition appearing on the back of the buyer's order (exhibit D1) which purports to exempt the agreement from the provisions of section 14 of the Sale of Goods Act 1979 was void and unenforceable as it was not only repugnant to the oral promise (*Evans J. & Son (Portsmouth) Limited* v. *Andrea Merzario Ltd.*[4]) but would also not be, in my judgment, fair or reasonable to allow reliance on that term or condition in the circumstances of this case.

I reasoned that the measure of damages for the breach of the warranty should be calculated as follows. The price of such a new car in Australia in the year 1978 (page 15 of agreed bundle "C") was about M$25,000.00 to M$26,000.00 Assuming that the plaintiff had the funds after his return to Australia in 1978 to purchase a car of that model which was a few months and not more than a year old, I considered that it would have cost him about M$17,000.00 i.e. roughly about 2/3 the price of a new car of that make and model in 1978. The plaintiff sold his car in Malaysia through his friend, Drake (P.W.2) for $6,500.00. Therefore the loss directly and naturally resulting in the course of events from the breach of warranty was estimated by me to be about $10,500.00 and I, therefore, awarded general damages only of $10,500.00 plus interest at 8% from date of writ to date of payment. The reason why I only awarded costs on the subordinate courts scale was simply because the sum recovered was less than $25,000.00. But if one were to consider the number of days the case was argued in the High Court together with the mass of documents which was produced and had to be perused as well as the points of law raised by

both sides, the court might well have, in the circumstances of this case, also considered and awarded High Court costs.

From the above Judgment, the defendants appealed to the Federal Court.

FEDERAL COURT.

K. Anantham for the appellant.

N.T. Vello (*Navaratnam* with him) for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the Judgment of the Court): This is an appeal from the decision of Gunn Chit Tuan, J. The facts are as follows:

The facts:

The respondent, one Alan McKnight, was a squadron leader in the Royal Australian Air Force (RAAF). In January, 1978 he was just posted to the RAAF base at Butterworth and expected to be there for the next three years. Under an agreement between his Government and the Malaysian Government, the respondent as a serviceman was entitled to purchase in Malaysia a duty-free car for local use provided that the car would be taken out of Malaysia at the end of his tour of duty, and if the same car was imported to Australia he was also entitled to an Australian import duty exemption. As he enjoyed tax exemptions from both countries, i.e. Malaysia and Australia, he decided to buy a car which he could take back to and use in Australia. But he must buy a car which conformed to the Australian Design Regulations (ADRs); otherwise it could not be registered in Australia, in particular in New South Wales and Victoria, where he expected to be re-posted.

Having made up his mind to buy such a car he contacted the appellants' salesman named Mr. Thomas, and after finding the services of this salesman rather unsatisfactory, he was attended to by another salesman, named Mr. Bobby Sze. After two meetings with Mr. Sze on January 5 and 6, 1978, the respondent signed a Buyer's Order, exhibit D1, (in this judgment referred to as the Order) on January 9, 1978, whereby he committed himself to buy a white Datsun 260C Station Wagon at an agreed price of $17,719.54. Six conditions were printed on the reverse side of the Order, one of which, being relevant to this case, is condition No. 5, which is as follows:

"No guarantee or warranty of any kind whatsoever is given by the Company in respect of the vehicle, the subject of the order, unless such guarantee and/or warranty is separately stipulated in writing hereto, but the Buyer/Hirer shall be entitled to the benefit of the Manufacturer's warranty."

However, prior to the signing of the Order, during the first meeting on January 5, 1978 the respondent informed Mr. Sze that he wanted to buy a car that must conform to the ADRs as he wished to take it back to Australia. Mr. Sze replied that he could sell such a car but that he would have to import it first from its manufacturers in Japan. In the second meeting on January 6, 1978 Mr. Sze informed the respondent that he had cabled Japan for delivery of the car at Singapore and in the third meeting on January 9, 1978 Mr. Sze pulled out a document – which he purported to be a cable – from his brief case and read it out to the respondent to the effect that Nissan, the manufacturers, was taking out a car from its Australian assembly line and shipping it to Singapore. This document was never shown to the respondent, nor did he insist upon seeing it. To ensure that the car would be registered in Australia, the respondent insisted upon a plate called a compliance plate or a letter from the manufacturers guaranteeing or indicating that the vehicle complied with the ADRs. Mr. Sze said that the car he was ordering for the respondent would have no compliance plate but he would give the respondent such guarantee letter from the manufacturers when the car would be delivered to him. It was on the basis of these conversations with Mr. Sze and persuaded by his conduct that the respondent signed the Order.

Finally, a white Datsun 260C Station Wagon was delivered to the respondent on May 3, 1978 and the price paid. But the car did not comply with the ADRs as earlier promised. This is clearly proved by the manufacturers' letter dated June 12, 1978 written in response to an inquiry by the respondent dated June 5, 1978 after he had discovered that the appellants had become uncooperative and unhelpful. Attempts at obtaining a guarantee letter also proved unsuccessful. In the meantime the respondent was re-posted to Australia and as he could not take the car back with him because of non-compliance with the ADRs, he caused it to be sold through his friend. It was sold for $6,500.00, thereby incurring a loss of $11,219.54, ($17,719.54-$6,500.00).

As a result of this dealing with the appellants,

the respondent did not only incur a financial loss, but also lost a fiscal advantage of having to import a car into Australia duty-free. He thus sued the appellants claiming damages for breach of warranty; the warranty being that the appellants would deliver to him a white Datsun 260C Station Wagon which complied with the ADRs, but in breach of such promise the appellants delivered to him only an ordinary white Datsun 260C Station Wagon which not only did not comply with the ADRs, but also could not be modified to comply with these regulations.

The appellants denied that they ever made any such representation or assurance. They also denied liability because paragraph 5 of the conditions printed at the back of the Order (exhibit D1) which the respondent signed exempted them from any oral guarantee or warranty.

At the trial several witnesses were called by both sides. The learned trial judge accepted the evidence of the respondent and found that there was such a warranty made and breached by the appellants and awarded general damages of $10,500.00, with interest at 8% per annum from the date of the writ to the date of payment, and costs of the suit at the subordinate court's scale. No special damages were awarded.

The appellants appealed to us contending that they are not liable or that the damages awarded were too high, whilst the respondent cross-appealed on the ground that the damages were too low and that he was entitled to the interest from the date of the accrual of the cause of action and to the costs of the suit at the High Court scale and also to special damages.

Issue of Liability – Warranty:

At the outset of this appeal counsel for the appellants conceded that he accepted the findings of facts by the learned trial judge. The appeal was therefore confined to legal issues on liability and quantum only.

As to the issue of liability the first question to ask in this case is this: Was there a warranty and, if so, was it breached?

The word "warranty" in the law of Contract tends to be confusing as it may relate to a term of a contract, or to a separate enforceable promise which is collateral to a contract. (See *Anson's* 24th ed. pp. 125-129). Insofar as the word is used to denote a term of a contract, its employment is purely for the purpose of distinguishing the most important terms (known as conditions) from the less important ones (known as warranty), the breaches of which lead to different results and give different remedies to the innocent party. If the term breached is a condition, the innocent party has the right to repudiate the contract and consider himself discharged therefrom and claim damages for the breach. If on the other hand the term broken is only a warranty the innocent party cannot repudiate the contract and his remedy is confined to the claim for damages only. In the case of a breach of a condition it is of course open to the innocent party to treat the matter as a breach of warranty and sue for the damages only without having to repudiate the contract.

The other context in which the word "warranty" is used in the law of Contract is a separate pre-contract statement on the basis of which parties subsequently entered into a contract. Such pre-contract statements are binding and enforceable as a collateral warranty. It is referred to as collateral because it is external and subsidiary to the main contract. *Erskine* v. *Adeane*[7]; *De Lassalle* v. *Guildford*[8].

It is in the context of a collateral warranty that the respondent found his cause of action in this case, although he referred to it in paragraph 5 of his statement of claim as an "express" warranty. We attach no legal significance to the word "express" here other than indicating or referring to the manner in which the warranty was communicated or expressed to the respondent. It was expressed by words of mouth and by conduct of Mr. Sze.

For the purpose of determining whether these words and conduct amount to a warranty enforceable at the suit of the respondent, we can do no better than be guided by the test laid down by Lord Denning, M.R. in *Dick Bentley Productions Ltd. & Anor.* v. *Harold Smith (Motors) Ltd.*[9] a test which he had followed and applied in subsequent cases. The test is this:

> "Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on. But the

maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances for him to be bound by it."

One of the ways to rebut this *prima facie* inference is for the maker of the representation to show that he honestly believed on reasonable grounds that it was true. *Chess (Oscar) Ltd.* v. *Williams*[10] and *Heilbut, Symons & Co.* v. *Buckleton*[6].

Reverting to the present appeal, there can be no doubt that it was the representations by Mr. Sze expressed by words and conduct that led to the respondent to enter into the agreement to purchase the car. Unless the appellants could show that they were innocent of making them, the representations shall be binding. In our view, there is an abundance of evidence showing that the representations were not innocent and on the contrary could even be considered to be deceitful or plain lies. It is recalled that Mr. Sze said that he would have to import the car from Japan and that he had cabled Japan for delivery of it in Singapore, and a few days later he read out to the respondent what purported to be a telegram from Nissan in Japan to the effect that it had taken out a car from its Australian assembly line and shipped it to Singapore. These statements were not only untrue but also obviously lying and calculated to mislead the respondent into placing an order for a car. If Nissan had actually taken out a car from its Australian assembly line, the car delivered to the respondent would have been complying with the ADRs. Further, if Mr. Sze had actually cabled Japan and had received a cable in reply, there was no necessity at all for Mr. Quah Keat Ban, the salesmanager of the appellants, under whom Mr. Sze worked, to write a letter on January 9, 1978 – i.e. the same date as the date of the Order – to the appellants' office in Singapore informing the latter that a new Datsun 260C Station Wagon was sold to the respondent and requesting that office to reserve a car for collection in a few days' time. The truth is that no such cables were ever sent to or received from Japan. In the circumstances of the case, we cannot see how the appellants could rebut the *prima facie* inference of the binding nature of these representations. There is no inkling of an honest belief at all in the truth of these representations.

Counsel for the appellants submitted to us that the respondent was not relying upon the representations made by Mr. Sze when signing the Order (exhibit D1) and that even if he did so rely, Mr. Sze had no authority to bind the appellants by such representations. With respect, we remain unpersuaded.

As to the effect of the representations on the respondent, there is clear evidence that had it not been for the promise of Mr. Sze to deliver him a white Datsun 260C Station Wagon complying with the ADRs, he would not have signed the Order. In his evidence, which the learned trial judge accepted, the respondent said:

"After satisfying myself I entered into a contract. I pointed out to Mr. Sze that contract did not refer to ADRs and he said it was not necessary to include it as the price of the car was specially for a car imported for sale and eventual import into Australia." (page 123, F-G of Appeal Record)

We therefore respectfully reject the submission.

We also cannot accept the submission by counsel for the appellant that the representations by Mr. Sze were not binding on the appellants, because he was only a salesman. To bind the appellants, counsel argued, the representations must be made by a person of a higher authority than a salesman. As between him and the appellants, Mr. Sze might not have the authority to make the representations, but as regards the relationship between the appellants and the respondent, Mr. Sze, as a salesman, employed by the appellants, certainly had an ostensible authority to make these representations. Selling cars was the job of Mr. Sze and these representations were made by him in the course of selling a car to the respondent. It would lead to a great mischief in the law and certainly would not be in the interest of business efficacy if representations made by a salesman in the course of his employment could not be relied upon by an intending purchaser whom he was dealing with. If an attendant employed by a garage owner in *Mendelssohn* v. *Normand Ltd.*[6] could be held to have an ostensible authority to make a representation to a client of the garage to the effect that he would lock the client's car, likewise a car salesman must be held to have the same authority; otherwise no one would deal with a salesman and everybody would insist on dealing with the manager. In any case Mr. Sze was not an ordinary salesman. He appeared to have enjoyed the trust and confidence of the appellants and must be a reliable one, because after the respondent had complained of the inefficient and unsatisfactory service of the previous salesman,

Mr. Thomas, Mr. Sze was the one who was sent to deal with the respondent. Furthermore, we observe that at the time of the trial in September, 1981 Mr. Sze had already became the appellants' Branch Manager at Ipoh. These facts clearly show that Mr. Sze was at the material time a very much trusted employee of the appellants. Thus the submission fails.

Admissibility of Pre-contract statements and section 92 of Evidence Act:

There is this rule of evidence contained in section 92 of the Evidence Act to the effect that no oral evidence will be admissible to contradict, vary, add or subtract the terms of a written agreement unless the oral evidence comes within one of the exceptions or illustrations contained in the section. Counsel for the appellants therefore submitted that the representations having been orally made, whilst the agreement, namely the Order, being in writing, the representations were therefore not admissible. The case of *Wong Wai Cheng* v. *A.G. Singapore*[1] was referred to in the court below as an authority for the submission. That case, however, dealt with an attempt by a party to the contract to prove an implied term which would affect the terms of the written contract by relying upon pre-contract negotiations and statements. But the primary purpose – rather the dominant purpose – of proving the pre-contract statements in the case under the present appeal was not to contradict, vary, add or subtract the terms of the Order, but to prove the existence of a warranty, a separate contractual promise, although such proof resulted in a conflict between the warranty and the terms of the contract subsequently entered into. Such proof is obviously allowed by the provisions (b) and (c) and also illustrations (d), (g) and (h) of section 92. Perhaps, a short answer to the objection can be given in that the prohibition against admissibility of evidence under section 92 only applies where all – as opposed to some only – of the terms of the contract are written into the agreement. Thus where some terms are given orally and some in writing, oral evidence could be given to prove the terms agreed to orally. The expression "When the terms of any such contract" at the beginning of section 92 must be read to mean "When *all* the terms of any such contract". *Damu Jadhao* v. *Paras Nath Singh*[5].

We therefore hold that the oral representations made by Mr. Sze were admissible.

Printed condition No. 5:

Having decided that the representations were a warranty binding upon the appellants on those behalf Mr. Sze made them, the next question is to determine whether the appellants could rely upon their printed condition No. 5 to exclude the effect of the representations. For our guide it is necessary to examine the principles applied by the Court of Appeal in England in *J. Evans & Son (Portsmouth) Ltd.* v. *Andrea Merzario Ltd.*[4] In this case, an English importer of machinery from Italy had been using the services of a forwarding agent at Rotterdam to place the goods in crates or trailers and ship them below deck. Later, when the agent wished to ship the goods by means of containers, the agent gave an oral assurance to the importer that the machines would be carried in containers and placed under deck. On the faith of the assurance the importer agreed to enter into a contract of carriage which contained the usual printed standard conditions of the forwarding trade exempting the agent from liability. As a result of swells occurring during the voyage, the goods were lost. On a suit and the subsequent appeal by the importer, the Court of Appeal held that notwithstanding the printed conditions, the oral assurance given by the agent was binding. Denning M.R. regarded the oral assurance as a distinct collateral agreement or warranty, whilst Roskill L.J., besides agreeing with Lord Denning, thought that the oral representations formed an integral part of the agreement for the carriage of goods. Geoffrey Lane L.J. on the other hand considered the oral representation to be a new term of the contract altogether – a term superimposed upon the previous contracts on the basis of which goods had been carried previously. In any event, whether one regards the oral representation as a separate agreement or as an integral part of it or even as a new term, there is no running away from the fact that the oral representation was contradictory to the printed conditions. This conflict did not in any way deter the court from doing justice. By relying on the authority of Devlin J. (as he then was) in *Firestone Tyre Rubber Co. Ltd.* v. *Vokins Ltd.*[10], the court held that as the importer entered into the contract on the basis of the oral representation, the printed conditions exempting the agent from liability were repugnant to such representation and should therefore be rejected, as otherwise the latter would become completely illusory. Thus by treating the oral representation as having an overriding effect the importer was held to be entitled

to damages. It is the need to attach responsibility upon the maker of pre-contract statements that such statements have been given an overriding effect by the court despite their defiance of the terms of a written contract – See *Anson* p. 128.

Reverting to the present appeal, whether we regard the representations by Mr. Sze as a warranty, i.e. as an enforceable contractual promise, or as an integral part of the sale contract it is clear that these representations are in conflict with condition No. 5 printed on the reverse side of the Order signed by the respondent. However, on the authority of *J. Evans & Son's* case (*supra*) and other authorities cited by Lord Denning in that case, we hold that the representations must be given an overriding effect and the printed condition must therefore be rejected.

Application of English law:

In the court below there were some arguments about the application of English Sale of Goods Act, 1979. Counsel for the appellants contended that although English law relating to the sale of goods applied to this case because of section 5(2) of our Civil Law Act, 1956, the applicable law was the Sale of Goods Act, 1893 and not the 1979 Act. Counsel for the respondent on the other hand submitted that the law applicable was the 1979 Act and therefore invoked section 14(3) of the Act in order to show that in this case there was an implied condition as to the fitness of the car for the purpose of importation into and use in Australia, because the respondent had informed the appellants of its intended use and for the purpose had relied upon the judgment and skill of the appellants. It must be noted that the 1893 Act was completely replaced by the 1979 Act and that the provision of section 14(3) of the 1979 Act is not new; it being a re-enactment of section 14(1) of the 1893 Act though not in identical terms. Thus, whatever English Act is applicable it is clear that in English law before and after 1979 a buyer is entitled to rely upon an implied condition as to fitness of the goods for use of which he bought them provided of course he communicated to the seller the intended use of goods and relied upon their judgment and skill. *See Benjamin's* Sale of Goods (1974), paras 810-824.

However, in the context of the present appeal as we have already held that the pre-contract representations were a warranty, for the breach of which the appellants are liable, the question concerning an implied condition as to fitness of purpose would be irrelevant and at the most would only represent the respondent's alternative ground to claim liability against the appellants. Since the respondent contended, and we accept, that the pre-contract statements made by Mr. Sze were an express warranty, we cannot see how the same statements could be held to be an implied term and condition. Such contention would amount to saying that the express becomes an implied. This is obviously absurd and illogical. We, therefore, do not think it necessary or relevant to decide the question as to which of the two English Sale of Goods Acts, whether the 1893 Act or the 1979 Act by virtue of section 5(2) of our Civil Law Act 1956 is applicable.

Damages:

The measure of damages in respect of the breach of warranty is prescribed in section 53 of the 1979 Act, which is a re-enactment of section 53 of the 1893 Act. Thus whether the 1979 or the 1893 Act is considered to be the governing Act, it makes no difference – the provisions being the same under both Acts. The relevant provisions are subsections (2) and (3), which are as follows:

> "(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty;
>
> (3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty."

Because there is no car complying with the ADRs available in Malaysian market, it is clear that the yardstick laid down in subsection (3) above cannot be applied. Moreover, the warranty in the present case is not a mere warranty of quality covered by this subsection, but a warranty as to the nature or essence of the car itself. Thus the only rule applicable for the purpose of determining damages in this case must be the rule laid down in subsection (2); which itself is the first limb of the principle laid down in the celebrated case of *Hadley* v. *Baxendale*[13] which was incorporated in section 74(1) of our Contract Act, 1950, i.e. the estimated loss directly and naturally resulting in the ordinary course of events from the breach.

There can be no doubt that the respondent incurred a financial loss of $11,219.54, being the difference between the price he paid for the car which did not answer to the warranty and the price he obtained when he sold it subsequently,

($17,719.54 – $6,500.00). In addition to this loss, he also lost a fiscal advantage of bringing the car into Australia without customs duty. Although this loss was pleaded in paragraph 9 of the respondent's statement of claim, not an iota of evidence was led by the respondent. Whilst evidence as to the price of a similar car complying with the ADRs was given as at A$10,578.88, no evidence was, however, given as to the amount or rate of Australian import duty on such car or other cars, nor was the court informed as to whether the price given above was inclusive or exclusive of the import duty. In our view the fiscal advantage which the respondent lost and for which he should be compensated should be the amount of import duty which he would have saved because of the exemption enjoyed by him under the Australian law. The other advantage which he lost was probably his eligibility of having the car transported to Australia at the expense of his Government. Since no evidence was led on these matters, it is impracticable for us to go further and measure his fiscal loss as in the absence of any evidence it would be highly speculative to do so. We therefore hold that the amount of damages which should be awarded should be the financial loss directly suffered by him as a result of the dealing with the appellants, i.e. $11,219.54. The award made by the learned trial judge should be altered accordingly.

Special damages and amendment of pleadings:

The respondent cross-appealed on the omission of the learned trial judge to award special damages for deprivation of the use of a car resulting in his incurring travelling expenses for himself and members of his family during the period of 3 months after his return to Australia until he purchased a new car. As these damages were not pleaded and the respondent's application to amend the Statement of Claim to include them had been overruled, the learned trial judge therefore did not make the award complained of. There is, however, the uncontroverted evidence given by the respondent on this point, which is as follows:

"I was without a car for three months and had to travel by public transport which cost A$10.00 per day. ... I claim damage for breach of warranty and also special damage for loss of use of a car, interest and costs." (page 126 of Appeal Record)

Thus for three months at A$10.00 per day, the travelling expenses were computed to be A$900.00, i.e. 90 days (being three months) times A$10.00, and at the rate of exchange of M$2.6015 for A$1.00, the amount of claim under this heading is M$2, 341.35.

This claim could not of course succeed unless the Statement of Claim is amended. His appeal on this point is therefore essentially an appeal against the refusal of the learned trial judge to allow his application to amend the Statement of Claim which he had made in the course of submissions in the court below. The special damages claimed by the respondent in this case were not of the nature that involved complicated computations but one which any person must as part of his living expenses in the present day world have incurred. Moreover, as evidence was already given by the respondent without any objection or a murmur by the appellants, there cannot really be any objection against the pleading being amended. We, therefore, feel that it is just and proper that the learned trial judge should allow the amendment of the pleading and make the necessary award on the basis of the evidence given.

Interest:

The next point raised in the respondent's cross-appeal is interest. He submitted that the 8% interest awarded by the learned trial judge should run from the date of the breach of the warranty, i.e. May 3, 1978, the date when the car was delivered to the respondent and not from the date of the writ. As interest is a matter of discretion, we cannot see how on the facts of this case the learned judge was in error to order interest to run from the date of the writ.

Costs:

As to the costs, we agree with counsel for the respondent that these should be fixed at High Court scales, because we ourselves find that this is not an easy case to deal with. It involves difficult points of law, especially on the question of warranty and measure of damages.

Conclusion:

Finally for the reasons given in the preceding paragraphs, we dismiss the appellants' appeal with costs and allow the respondent's cross-appeal also with costs. Our order should be that the respondent is entitled to:

(a) general damages of $11,219.54;

(b) special damage of $2,341.35;

(c) interest at 8% per annum from the date of the writ;

(d) costs at High Court scale in the court below;

(e) costs of this appeal and cross-appeal; and

(f) the deposit should be given to the respondent on account of taxed costs.

Order accordingly.

Solicitors: *Skrine & Co.; Chang & Vello.*

T. BARIAM SINGH v. PEGAWAI PENTADBIR PESAKA MALAYSIA (ADMINISTRATOR OF ESTATE OF DATUK FOO SAY LEE)

[O.C.J. (Mohamed Zahir J.) January 28 & May 12, 1980]
[Kota Bharu – Civil Suit No. 2 of 1970]

Contract – Security for loan – Malay Reservation land title as security for loan – Whether contract null and void – Kelantan Malay Reservations Enactment 1930, ss. 7, 9, 9A(1), 12(i) & 13A – Kelantan Land Enactment 1938 (repealed), ss. 2, 104, 105(i), 106 & 128 – National Land Code, ss. 2, 4, 270 & 281.

Land Law – Malay Reservation land title – Security for loan – Whether contract of loan null and void.

The plaintiff in this case sued the defendant for the repayment of $10,000/- being a loan on a promissory note. The issue before the court was whether the defendant, Datuk Foo, in depositing a Malay Reservation land title with the plaintiff as security for a loan, rendered the contract of loan null and void.

Held: (1) what the law aims at is that the land should not fall into the hands of a non-Malay as clearly can be argued from section 7(i) of the Kelantan Land Malay Reservations Enactment. It does not confine itself to the interest of the existing Malay proprietor. "Any Malay" intended here is the general Malay and not any Malay in particular. If it is otherwise, then even a Malay chargee cannot levy execution on the land by sale as interest of the Malay proprietor is affected;

(2) if acts are done in accordance with the Malay Reservations Enactment, then such acts are lawful;

(3) in the instant case, there was nothing illegal in the mere deposit of title by the defendant. The deposit of title was made during the life of the Land Enactment which was then in force. There is no provision in either the Malay Reservations Enactment or the Land Enactment which prohibits such deposit of title and such deposit of title was therefore not illegal;

(4) the plaintiff was therefore entitled to enter judgement against defendant for the sum of $10,000/- and interest.

Cases referred to:–

(1) *Ho Giok Chay* v. *Nik Aishah* [1961] M.L.J. 49.
(2) *Foo Say Lee* v. *Ooi Heng Wai* [1969] 1 M.L.J. 47.
(3) *Gan Khor* v. *Soan bin Pelita* [1935] M.L.J. 158.
(4) *Idris bin Haji Mohamed Amin* v. *Ng Ah Siew* [1935] M.L.J. 257.
(5) *Tan Hong Chit* v. *Lim Kin Wan* [1964] M.L.J. 113.
(6) *David* v. *De Silva* [1934] A.C. 106.

CIVIL SUIT.

C. Jegathesan for the plaintiff.
Lim Hong Sang for the defendant.

Cur. Adv. Vult.

Mohamed Zahir J.: The plaintiff sued the defendant for the repayment of $10,000/- being a loan on a promissory note. The Defence Counsel abandoned all his other defences and asked the court to consider only the issue of illegality under the Kelantan Malay Reservations Enactment 1930. The Plaintiff's Counsel agreed and I accordingly ordered the parties to submit on this point alone. The issue is whether the defendant, Datuk Foo Say Lee, in depositing a Malay Reservation land title with the plaintiff as security for a loan, rendered the contract of loan null and void.

Mr. Lim, Counsel for the Defence, submitted that by virtue of section 12(i) of the Enactment, the contract between the parties is void. The reason is that the promissory note, AB3, contained as security for the loan the deposit of title bearing Grant No. 2481/9 Lot No. 80, section 14 of Kota Bharu, a Malay Reservation land belonging to the borrower with the plaintiff who is a licensed moneylender and the accompanying memorandum of agreement for repayment (AB1) also referred to such security.

Section 12(i) of the Enactment reads as follows:–

"All dealings or disposals whatsoever and all attempts to deal in or dispose of Reservation land contrary to the provisions of this Enactment shall be null and void."

and Counsel referred to section 9 which reads as follows:–

"No right or interest of any Malay in Reservation land shall be sold in execution of a decree or by order of any court or for non-payment of rent due to the Government to any person not being a Malay."

and also Section 9A(1) which reads as follows:–